

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Maritime Communications/Land Mobile LLC) DA 10-556
and Southern California Regional Rail) WT Docket No. 10-83
Authority (“SCRAA”) Applications to Modify) File Nos. 0004153701, 0004144435
License and Assign Spectrum for (allegedly)) File No. 0002303355 ¹
Positive Train Control Use, and to Request) Call Sign: WQGF318
Waivers of Part 80 Rules)

To: Office of the Secretary
Attn: Wireless Telecommunications Bureau

Motion to Dismiss Motion for Conditional Grant²,
or in the Alternative,
Opposition to Motion for Conditional Grant

“Petitioners”³ hereby file this motion to dismiss (the “D-Motion”) to the Maritime Communications/Land Mobile LLC (“MCLM”) motion for conditional grant (the “Motion” or the “MCLM Motion”) of the above-captioned applications (together the “Applications”), one Application of which seeks to modify (the “Modification”) the above-captioned license (the “License”) and the other that seeks to partition and assign to Southern California Regional Rail Authority (“SCRRA”) (the “Assignment”) part of the License, along with associated rule waiver requests (the “Waivers”). Petitioners note here that SCRRA filed a similar motion of its own in the past and Petitioners have filed an initial opposition of it (the “SCRRA Motion”).

In the alternative, if the FCC accepts the MCLM Motion and does not dismiss it, then Petitioners submit under Section II below an opposition, in the alternative (the “Opposition”)

¹ Petitioners are including here the MCLM Auction No. 61 Form 601 for the reasons stated in Petitioners’ opposition to the SCRRA motion for conditional grant and since the MCLM Form 601 for Auction No. 61 resulted in the subject License and many of the facts and arguments contained herein also relate to that MCLM Form 601.

² Any capitalized term not defined herein the meaning given in the Petition to Deny.

³ Warren Havens (“Havens”), Environmental LLC (“ENL”), Verde Systems LLC (“VSL”), Intelligent Transportation & Monitoring Wireless LLC (“ITL”), Telesaurus Holdings GB LLC (“THL”) and Skybridge Spectrum Foundation (“Skybridge”) (together, the “Petitioners”).

I. Motion to Dismiss

For the reasons given in this section and also discussed in part in the section II below, the MCLM Motion is procedurally defective and not allowed by rule, and therefore, should be dismissed.

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In sum, the Motion is defective and must be summarily dismissed since:

(1) the Motion states a modification of the subject Assignment Application but it was not filed as required on Form 601 as a modification amendment,

(2) motions for a interim grant of a license application are not specifically authorized in any rule,

(3) a motion cannot be used to evade substantive requirements of rules, only for permitted procedure not in conflict with said substantive requirements,

(4) the Motion effectively seeks waivers but was not filed as a waiver request and does not meet the standards for grant of waivers,

(5) the Motion is in direct conflict with the only permitted actions by the FCC in this case for the subject assignment application subject to Petitioners petition to deny under rule section 1.945(d) and (e),

(6) the Motion is in direct conflict with Section 309(d) of the Communications Act and the FCC has no authority to act contrary to this section, and

(7) for other reasons given herein (including in the referenced and incorporated materials).

While these reasons that the Motion is procedurally defective and must be dismissed are clear, we discuss some of them below, as well as in the referenced and incorporated materials.

FCC rules provide for certain motions (in formal hearings, etc.), but none allow a motion to modify a license assignment application, or to seek action on an license assignment application subject to a petition to deny contrary to the FCC rules that govern in this situation, as in this case.

At best, the Motion may be considered a mislabeled informal request under rule section 1.41. However, any such informal request must be summarily dismissed since to be granted FCC rules must be waived but no waiver request was submitted, nor the required fees paid. Further, the Motion if granted would require waiving Section 309(d) of the Communications Act and the FCC has no authority to waive this Section or any part of the Communications Act that requires FCC to follow specified procedure.

Alternatively, the Motion may be deemed a late-filed Reply to the subject Petition to Deny, but if so construed, the Motion must be summarily dismissed since no request for leave to file the tardy effectively additional Reply was submitted.

The applicable law is 47 USC Section 309(d)⁴ and the related FCC rule. Section 1945 provides, in pertinent part:

⁴ Section 309 provides in pertinent part (emphasis added for reasons given in argument under rule section 1945 above):

(d) Petition to deny application; time; contents; reply; findings.

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies....

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) (or subsection (k) in the case of renewal of any broadcast station license), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application

(d) Grant of petitioned applications. The FCC may grant, without a formal hearing, an application against which petition(s) to deny have been filed. If any petition(s) to deny are pending (i.e. have not been dismissed or withdrawn by the petitioner) when an application is granted, the FCC will deny the petition(s) and issue a concise statement of the reason(s) for the denial, disposing of all substantive issues raised in the petitions.

(e) Partial and conditional grants. The FCC may grant applications in part, and/or subject to conditions other than those normally applied to authorizations of the same type. When the FCC does this, it will inform the applicant of the reasons therefor. Such partial or conditional grants are final unless the FCC revises its action in response to a petition for reconsideration. Such petitions for reconsideration must be filed by the applicant within thirty days after the date of the letter or order stating the reasons for the partial or conditional grant, and must reject the partial or conditional grant and return the instrument of authorization.

Section 1.945(d) does not permit the Motion or grant of it, including since the FCC must “dispos[e] of all substantive issues raised in the petitions.” The Motion seeks that the FCC grant the subject application (whether on interim basis or not, it seek a grant) in which the FCC specifically does not dispose of all the issues in the subject petition, in fact, it pretends that the only issues are those in the FCC Enforcement Bureau investigation, which is a different proceeding from the subject petition to deny, and which does not include many of the facts and arguments in the petition proceeding. Indeed, no one but the Enforcement Bureau knows all the facts in that investigation.

Section 1.945 (e) does not permit the Motion or grant if it, either, including since any such grants are “final unless the FCC revises its action in response to a petition for reconsideration.” This rule is clearly one to allow the FCC, on its own motion, to grant something other than in an application, if it finds good cause, and to stick to that as final, unless the applicant (or other party with standing) prevails in a petition for

would be consistent with subsection (a) (or subsection (k) in the case of renewal of any broadcast station license), it shall proceed as provided in subsection (e).

reconsideration. It does not allow a petition by an applicant to grant something other than what it requested in an application without modifying that application, or for a conditional grant in which the condition is “interim” or some other non-final disposition of the application and challenging petition.

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The relief requested is available, thus Motion is futile. The Motion of MCLM and the preceding same motion (in content) by SCRAA states that SCRAA needs to move forward soon with testing out PTC using the subject AMTS spectrum, and that is the reason the Motion should be granted. However, it can do that under a developmental or experimental license. The Motion for extraordinary and impermissible relief should be summarily dismissed on this basis also. In fact, the SCRAA-PTC 220-Union Pacific are already doing that: see below, and until that experiment is done, SCRAA cannot deploy anything on the spectrum.

The requested relieve is also spurious, since SCRAA has no radios to use for the quick deployment it asserts justifies grant of the extraordinary relief. See Exhibit 3: it is self explanatory for the most part. The other part is that Union Pacific, which is a major owner of PTC 220, and which together are partners with SCRAA in seeking the subject MCLM spectrum and in deploying the planned PTC (and other applications) system with it in the SCRAA area, is the entity that filed this experimental license shown in Exhibit 3. There are other clear statements in the railroad industry public domain information with the same content: that the PTC radios on 217-222 MHz are in development, and not yet completed and ready for use. SCRAA and MCLM are misleading the FCC on this matter also, in addition to their other fundamental assertions that 1 MHz is needed for PTC (that is contradicted not only by SCRAA

internal documents, but by every source in the industry).⁵

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In effect, the Motion is a request for waiver of FCC's rules including but not limited to waiver of Section 1.939(h), Section 1.945(d), Section 1.948(j)(viii), Section 1.927(i), Section 1.929, Section 1.933, and Section 1.1102 (waiver fee). However, MCLM and SCRRRA have not amended the Applications to request waivers, paid the required fees, or shown that they have met the requirements for grant of the waivers. As such, the MCLM Motion and SCRRRA Motion are defective and must be dismissed.

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The Motion should be dismissed for all the above reasons. It would be a waste of Commission staff resources to consider the "substance" of such a procedurally defective request, indeed, it would have the opposite effect of what the Motion pretends to seek, certain timely relief.

In fact, the Motion is a specious attempt to get a final decision on the "merits" of the SCRAA- PTC 220 LLC asserted public interest assertions that, as PTC 220 LLC instructed the FCC "militate" grant for PTC. SCRAA and PTC seek that not because they are ready to test or deploy anything soon with the spectrum, as shown above, but since they are worried about Petitioners increasing showings in this proceeding that their "substance" lacks merit and is deceptive. They want to cut that off, and that should not be permitted. SCRAA has joined MCLM and brought PTC 220 LLC along, in practice of deception and cover ups before the FCC. That is why there are petitions against the MCLM spectrum and why the FCC Enforcement Bureau are investigating MCLM.

⁵ Including reports by SYSTRA, AMTRAK, and others, and requests for spectrum from similar metropolitan train operators such as DART (Dallas Area Rapid Transit): these all call for 100 kHz up to several hundred kHz, but never more, for PTC in many of the highest traffic (for trains) corridors in the nation.

II. Initial Opposition, in the Alternative

A. Reference and Incorporation

We present this initial opposition only if the FCC does not grant our motion to dismiss presented above.

Since the MCLM Motion referenced and incorporated the SCRRA Motion, including its exhibits, and states it is supplementing the SCRRA Motion, Petitioners hereby reference and incorporate in opposition all of their facts and arguments in the following initial opposition, including all attachments and exhibits, they filed against the SCRRA Motion:

Initial Opposition to Motion for Conditional Grant, including all attachments and exhibits, filed by Skybridge Spectrum Foundation et al. on November 9, 2010 in WT Docket No. 10-83 and filed via ULS regarding File Nos. 0004153701 and 0004144435 (the “First Opp”).

As noted in the First Opp, Petitioners could not complete it at that time due to the unlawful delays of SCRRA not fulfilling Petitioners’ CPRA request, which SCRRA has still not entirely fulfilled, and delays in the Federal Railroad Administration (“FRA”) providing documents to Petitioners’ FOIA Request related to SCRRA’s PTC plans, which were only recently provided (November 17, 2010—after the date the First Opp was due) to Petitioners after Petitioners threatened that they would file a court suit if the FRA did not provide responsive documents.

Exhibit B hereto is a chart indicating documents and records that from Petitioners review of the records provided by SCRRA to date have not been provided yet to SSF. It contains a partial list of those documents discussed or referred to in certain of the documents and communications provided by SCRRA to Petitioners. The listed documents are not contained in the records provided to SSF (For example, emails that reference an attachment, but then that attachment is not included). SCRRA has informed SSF that it is still working on providing further records. The FRA is also still gathering documents responsive to SSF’s FOIA request. Petitioners are still reviewing the documents eventually disclosed by SCRRA and FRA and are

still trying to get the additional documents not yet provided yet. Therefore, Petitioners reserve the right to supplement their filings against the Applications, including this Motion and their Petition, with further relevant information once they have finished their review of the documents received to date and after receipt and review of the additional documents.

B. 1MHz Not Needed for PTC (far less than half needed)

This is partly discussed in the Motion to Dismiss section above. The following is in addition. First, the point of this section is (i) the entire Application and defense is specious as to its asserted need for 1 MHz for PTC, and (ii) the asserted need for special relief in the Motion is undercut as well, where SCRAA does not need the spectrum subject of the special relief, and it will not be honest with the FCC as to its real needs (for amount of spectrum, for timing—see above regarding no equipment yet, for AMTS vs other spectrum, and in other matters).

Petitioners are attaching hereto as exhibits some documents that show SCRAA is not applying for 1 MHz of AMTS for its own PTC use, but it is applying for the AMTS in a partnership with PTC-220 LLC and it is not admitting that to the FCC. See for example, Exhibit A hereto and the other exhibits attached that reflect this. From Exhibit A it is clear from SCRAA's own internal communications that it needs far less than the entire 1 MHz of spectrum for PTC, yet the Applications do not state this and SCRAA does not explain why it needs grant of its waivers, which it says it needs to operate its PTC system, with respect to the majority of the spectrum on which it will not be using PTC. In fact, the evidence shows that SCRAA actually intends to use the spectrum in partnership with PTC-220 LLC and that PTC-220 LLC will be using the channels for its needs.

Further, in the documents received by SSF to date from SCRAA, there is a study entitled "Spectrum Estimation Study for Metrolink's PTC Project" by an Alan Polivka with Transportation Technology Center, Inc. (a division of the Association of American Railroads). It is dated July 2, 2010. Thus, SCRAA only recently commenced a detailed study to assess what

amount of spectrum it may need for PTC, despite having asserted to the FCC that it needs the entire 1 MHz for PTC. Petitioners have not been able to review in detail that study yet or have their engineering consultant experts do so in order to determine if any of its findings, assumptions, etc. are erroneous. Once they do so, then they will provide further comments on that. However, as indicated in Exhibit A hereto, SCRRA says it needs far less than the 1 MHz.

However, the Applications did not disclose any of this to the FCC. Thus, those exhibits only show further that SCRRA has lacked candor before the FCC regarding the Applications.

C. Motions are Really Waivers in Disguise

First, in this Opposition section, we refer to and incorporate the section in the Motion to Dismiss section on this topic. In addition is the following:

What MCLM and SCRRA are seeking by their respective motions is not permissible under any FCC rule. There is no basis in the FCC's rules for filing a motion for conditional grant of an assignment application that has been petitioned to deny. In effect, what they are both seeking, but do not candidly admit, is that they seek waiver of the FCC's rules under Section 1.925, including but not limited to waiver of Section 1.939(h), Section 1.945(d), Section 1.948(j)(viii), Section 1.927(i), Section 1.929, Section 1.933, and Section 1.1102 (waiver fee). Calling a waiver a motion does not make it one. A motion for conditional grant cannot be used to waive rule sections. A waiver must be filed to do that. However, MCLM and SCRRA have not amended the Applications to request waivers, paid the required fees, shown that they have met the threshold requirements for grant of the waivers, including that grant is in the public interest, and the Applications have not gone on the required Public Notice. Without doing all of this, the MCLM Motion and SCRRA Motion are both defective, notwithstanding all of the other reasons Petitioners give herein and in their First Opp to the SCRRA Motion. Even if the SCRRA and MCLM motions could be filed as motions and not waivers, which they cannot, they

would have to be filed as amendments to the Applications since they ask for a change to how the Applications are processed and the petitions to deny are handled.

D. Attempt to Circumvent Petitioners' Section 309 Petition to Deny

It appears that MCLM and SCRRRA, both represented by practiced FCC-legal counsel, are attempting to camouflage their waivers as a “motion” with the hope that they will be granted by the FCC so that they can circumvent Petitioners’ petition to deny of the Applications and proceed to take certain actions, which will then be more difficult or impossible for the FCC to undo later if necessary.⁶ Otherwise, they would have amended the Applications, instead of filing their motions in WT Docket No. 10-83 and as “pleadings” for expedited relief as reflected on ULS (pleadings for expedited relief are not for the purpose of waiving Commission rules in order to avoid dealing with petitions to deny that must be addressed as part of the normal application processing process prior to any grant of an application—see Sections 1.939(h), 1.945(d) and 1.948(j)(viii)). Thus, the MCLM Motion and SCRRRA Motion are defective as filed and should be dismissed as requested above or denied.

Petitioners make clear that they will not waive their petition rights under Section 1.939, Section 1.945 and Section 1.948, including to have their petitions of the Applications decided upon in accord with the FCC’s rules. Petitioners will be irreparably prejudiced and damaged if

⁶ Donald DePriest, who from evidence filed by Petitioners in FCC records is the real controlling interest in MCLM, has been shown to be insolvent and to have a laundry list of creditors seeking repayment, including the IRS, the State of Alabama, Oliver Phillips, an employee of his American Nonwovens company that suffered an injury, but later found out that Mr. DePriest had not paid for the employee insurance plan, etc. Based on the evidence shown in the Petitioners petition pleadings challenging MCLM’s AMTS licenses and in the FCC Enforcement Bureau investigation of MCLL, it is reasonable to assume that one possibility is that any payment to MCLM will likely be distributed to Mr. DePriest’s numerous creditors and then MCLM dissolved if the FCC later finds it to have violated its rules and be subject to disqualification and revocation of its licenses, thereby leaving no MCLM entity to repay any amounts obtained from SCRRRA or others to whom it sold or leased spectrum. Thus, it will likely create an administrative and legal quagmire, consuming even more Commission resources, if the Applications are granted conditionally now, and then later rescinded if Petitioners’ petitions are granted.

the impermissibly filed waivers—MCLM Motion and SCRRA Motion—are granted. Petitioners have already shown they are direct competitors with MCLM and that one of two of Petitioners, as the only lawful qualified high bidders in Auction No. 61, have the actual legal rights under Supreme Court precedent and a fair and just FCC auctions process to the spectrum subject of the License.

E. Petitions of the Applications Should Already Have Been Granted and a Hearing Commenced Given Ongoing Section 308 Proceeding

The MCLM Motion and SCRRA Motion cannot be granted since the FCC, as shown herein, must proceed to grant Petitioners' petitions to deny of the Applications and hold an evidentiary hearing. Given the pending Section 308 proceeding, and the fact that it is dealing with facts that raise serious questions about MCLM as a licensee and the License, including ones that affect and relate to whether grant of the Application is in the public interest, Petitioners do not see how the FCC cannot have already granted Petitioners' petitions to deny of the Applications (and for that matter all of their other petitions against MCLM) and moved to hold a hearing under Section 309. If evidence in Petitioners' petitions against MCLM has been sufficient for the FCC to have commenced a Section 308 investigation, then that same evidence clearly must be sufficient *prima facie* evidence to require a hearing under Section 309 (the Wireless Bureau's and the Enforcement Bureau's letters to MCLM and its affiliates clearly referenced facts in Petitioners' petitions to deny filed against MCLM as the basis for commencing the inquiry and investigation, and the questions asked of MCLM and its affiliates all related to matters raised by Petitioners' petitions, including the issue of MCLM control and ownership that pertains to all MCLM applications, including the Applications).

Since Petitioners have already given the FCC the evidence it used for its Section 308 investigation, it makes sense for the FCC to immediately grant Petitioners' petitions of the Applications (and other MCLM applications) so that Petitioners can begin to obtain further

information and evidence from MCLM and its affiliates and related parties as part of discovery in a hearing proceeding. The evidence the FCC obtains under both a Section 308 investigation and Section 309 hearing could then be used to decide on the Applications and MCLM as a licensee, as well as any parties that have aided or abetted it in its unlawful actions already evidenced by the clear facts and admissions in the record. Unless this is done, then any action on the Applications by the FCC would be premature and prejudicial to Petitioners.

F. MCLM and SCRRA Seek to Avoid
Additional Evidence in the Proceedings

Based on the evidence presented and MCLM and SCRRA's actions to date, Petitioners believe that MCLM and SCRRA want to circumvent the Section 309 petitions to deny filed by Petitioners' against the Application because MCLM and SCRRA realize the facts they contain are substantial and call for disqualification of MCLM and criminal prosecution of its controlling interests, including for perjury and fraud. Also, they fear that the longer the FCC takes the more likely Petitioners and the FCC Enforcement Bureau are to find additional evidence supporting Petitioners' petitions to deny.

This is evidenced by the fact that both the MCLM and SCRRA motions incorrectly suggest that the Section 308 proceeding is the only obstacle to grant of the Applications, when that is clearly not true—there are also Petitioners' petitions under Section 309. Petitioners' petitions gave facts and arguments against granting the Applications that were not just based on matters relating to Auction No. 61. Also, a separate Section 308 proceeding is not the same as a Section 309 proceeding, under which Petitioners have specific petition and appeal rights. Basically, as Petitioners' petitions stated, MCLM and SCRRA are working together to try to speed along the process in order to get grant of the Applications before the FCC has time to fully consider and investigate the evidence already presented by Petitioners and before any further damning evidence is found that would be an additional basis for dismissal of the Applications or

disqualification of MCLM as an FCC licensee. Petitioners and the FCC Enforcement Bureau will likely find more evidence regarding MCLM's actual control, ownership, affiliates, gross revenues, misrepresentations, perjury, etc. That has been the case to date.

In addition, SCRRA probably does not want Petitioners to uncover more evidence, including from documents that SSF has not yet been provided by SCRRA in response to SSF's California Public Records Act ("CPRA") Request, that shows that SCRRA's representations to the FCC about their PTC plans and spectrum needs were inaccurate or lacked candor, as Petitioners have shown so far in their petitions to deny of the Applications. Further, SCRRA may be worried that Petitioners will bring the matters involved up to the appropriate State of California authorities, including that SCRRA may have violated California state law by not holding a proper request for proposal and spectrum bid process to obtain bids and spectrum proposals from other 200 MHz and other spectrum band licensees, including VSL, Havens and SSF, who all hold 220-222 MHz or AMTS spectrum in California and are located in California.

G. California Law Issues

Also, Contrary to SCRRA's internal memos and documents, MCLM was not the single source of spectrum for SCRRA's PTC needs, SCRRA knew this and Petitioners intend to demonstrate that to the California Attorney General and other appropriate authorities due to violations of California law that appear to be involved, with sufficient evidence on hand. These are not subject to preemption under Section 332 of the Communications Act: they are matters of violation of California law independent of "entry" as meant in that Section.

H. SSF's Pending CPRA Request

As stated above in the Motion section I, the SCRRA has yet to completely fulfill SSF's CPRA Request and the FRA has not completely fulfilled SSF's FOIA Request. Thus, Petitioners' maintain the right to amend this Opposition and their petitions to deny of the Applications based on any additional relevant evidence SSF may obtain from that, as well as

what they may find in the hundreds of pages of records that have been obtained by SSF to date, including just a few weeks ago. Exhibit B hereto contains a partial list of some of the documents that appear to not have been provided to SSF yet by SCRRA.

I. Other materials

Other exhibits filed herewith support this filing for reasons shown therein, in added text notes and other indications added. In addition, Petitioners have been delayed by unlawful delays and ongoing withholding of information requested by Petitioners of SCRAA under the California Public Records Act, and by unlawful delays and withholdings by the Federal Railroad Administration of directly related materials under FOIA. Petitioners will submit further pleadings when that material is fully or sufficiently obtained and for other good cause. The Motion is not authorized in the first place, as described above. An unauthorized motion may be challenged at any time.

Respectfully,

Environmental LLC (formerly known as AMTS Consortium LLC), by

[Filed electronically. Signature on file.]

Warren Havens
President

Verde Systems LLC (formerly known as Telesaurus VPC LLC), by

[Filed electronically. Signature on file.]

Warren Havens
President

Intelligent Transportation & Monitoring Wireless LLC, by

[Filed electronically. Signature on file.]

Warren Havens
President

Telesaurus Holdings GB LLC, by

[Filed electronically. Signature on file.]

Warren Havens
President

Skybridge Spectrum Foundation, by

[Filed electronically. Signature on file.]

Warren Havens
President

Warren Havens, an Individual

[Filed electronically. Signature on file.]

Warren Havens

Each of Petitioners:

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Date: December 7, 2010

Declaration

I, Warren Havens, as President of Petitioners, hereby declare under penalty of perjury that the foregoing Motion to Dismiss, or in the Alternative, Opposition to Motion for Conditional Grant was prepared pursuant to my direction and control and that all the factual statements and representations contained herein are true and correct.

/s/ Warren Havens
[Submitted Electronically. Signature on File.]

Warren Havens

December 7, 2010

Certificate of Service

I, Warren C. Havens, certify that I have, on this 7th day of December 2010, caused to be served, by placing into the USPS mail system with first-class postage affixed, unless otherwise noted, a copy of the foregoing Motion to Dismiss, or in the Alternative, Opposition to Motion for Conditional Grant unless otherwise noted, to the following:⁷

Jeff Tobias, Mobility Divison, WTB
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⁷ The mailed copy being placed into a USPS drop-box today may not be processed by the USPS until the next business day.

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/s/ [Filed Electronically. Signature on File]

Warren Havens